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CASE NO. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

LYDIA SANTIAGO, as personal representative of the Estate of Jaime Santiago,
Petitioner,

v.

KATHLEEN WARE, WAYNE MIXDORF, TODD ZANGL, and DENNIS DANNER,
Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of Wisconsin

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The petitioner has asked the Court to review three questions: (1) whether an inmate has a liberty interest in continued participation in a community residential confinement program; (2) whether the "random and unauthorized" doctrine under 42 U.S.C. § 1983 applies when a hearing officer finds an

inmate guilty of misconduct without any evidence of guilt; and (3) whether certain claims under 42 U.S.C. § 1983 are waived by failing to raise the claims in an administrative appeal. Since February 18, 1997, when the petition for writ of certiorari in this case was initially submitted, there has been no intervening matter to justify a supplemental brief under Supreme Court Rule 15.8 on the second and third questions. The Court's March 18, 1997 decision in *Young v. Harper*, Case No. 95-1598, however, directly affects the petitioner's argument in the certiorari petition in support of review of the first question. Accordingly, she submits this supplemental brief to inform the Court of the significance of *Young v. Harper* on the certiorari petition.

ARGUMENT

UNDER *YOUNG V. HARPER*, SANTIAGO HAD A PROTECTED LIBERTY INTEREST UNDER THE DUE PROCESS CLAUSE ITSELF.

The focus of the argument in the certiorari petition on whether Jaime Santiago had a liberty interest in continued participation in Wisconsin's Conditional Residential Confinement ("CRC") program was on the role of states in creating protected liberty interests. In *Sandin v. Conner*, __ U.S. __, 115 S.Ct. 2293(1995), the Court held that courts need not "search for a negative implication from mandatory language" in state laws and regulations to determine whether a state-created liberty interest exists. The petitioner in this case asked the Court to decide the important question of whether that *Sandin* holding, in effect, eliminates the ability of states to create liberty interests by, for example, using explicit, positive language mandating due process. In her first point heading, however, the petitioner

pointed out that a decision in *Young v. Harper* might establish that Santiago had a protected liberty interest under the due process clause itself. If so, the Court need not reach the issue raised by the Court's holding in *Sandin v. Conner*.

The issue in *Young v. Harper* was whether an Oklahoma preparole conditional release program was like parole as the Court defined parole in *Morrissey v. Brewer*, 408 U.S. 471 (1972). *Young v. Harper*, 1997 U.S. LEXIS 1919, at *8. In concluding that the Oklahoma preparole program was equivalent to parole and that removal from it required due process protection, the Court relied extensively on *Morrissey*:

> 'The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence.' *Morrissey*, 408 U.S. at 477. In, *Morrissey*, we described the 'nature of the interest of the parolee in his continued liberty':
>
> > He can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison.... The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. *Id.*, at 482.

> This passage could just as easily have applied to respondent [Harper] while he was on preparole.

1997 U.S. LEXIS 1919, at * 9. With one major exception, it also could have applied to Santiago. Instead of relying on an implicit promise that his community program would be revoked only if he failed to live up to the program conditions, Santiago could rely on the explicit state rule that removal from the program for disciplinary reasons required a due process hearing.

In addressing the issue of whether Santiago's participation in the CRC program reflected a protected liberty interest, the Wisconsin Court of Appeals did not have the benefit of the Court's decision in *Young v. Harper*. It relied on *Sandin v. Conner* rather than *Morrissey v. Brewer*, and its reasons for reaching a different conclusion than the 10th Circuit reached in *Harper v. Young*, 64 F.3d 563 (10th Cir. 1995), are similar to the arguments that the Court rejected in its March 18, 1997 *Young v. Harper* decision. Petition for Writ of Certiorari to the Court of Appeals of the State of Wisconsin and Appendix, pp. 14a-22a. Based on *Young v. Harper* and *Morrissey v. Brewer*, this Court should summarily reverse the decision of the Wisconsin Court of Appeals that the CRC program did not create a liberty interest or, in the alternative, it should grant the petition for certiorari to determine the significance of the state's explicit mandate that removal from the program for disciplinary purposes be based on a due process hearing.

CONCLUSION

For the above reasons, and for the reasons stated in the certiorari petition, the petitioner respectfully requests that the Court grant the petition for certiorari, summarily dispose of the petition on its merits, or remand the case to the Wisconsin Court of Appeals for reconsideration in light of *Young v. Harper* and *Felder v. Casey*.

Respectfully submitted,

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